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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ANDERSON VALLEY ENVIRONMENTAL PROTECTION GROUP, Plaintiff and Appellant, v. COUNTY OF MENDOCINO, Defendant and Respondent; GARY KALIHER et al., Real Parties in Interest and Respondents.	A095009 (Mendocino County Super. Ct. No. 0083256)

This case involves the decision of the Mendocino County Board of Supervisors to modify a use permit to allow increased wine production, a tasting room, and retail wine sales at a small winery located within a residential subdivision between the Anderson Valley towns of Philo and Navarro. The Anderson Valley Environmental Protection Group appeals from a judgment denying its petition for writ of mandate challenging respondent County of Mendocino's modification of the use permit issued to Pepperwood Springs Winery. Appellant contends that the modification was approved in violation of the California Environmental Quality Act (CEQA) (Pub. Res. Code, § 21000 et seq.) and is inconsistent with the Mendocino County general plan and zoning ordinance. We disagree and affirm.

I. FACTS

We take the facts from the administrative record of proceedings before the Mendocino County Planning Commission (Commission) and the Mendocino County Board of Supervisors (Board), as well as from the detailed statements of fact in the trial court's order denying appellant's mandamus petition.

The Pepperwood Springs Winery is part of the Holmes Ranch subdivision, which was incorporated in May 1972 in a rural and unincorporated area of Mendocino County. The subdivision consists of 68 parcels, none of which are smaller than 20 acres. It has a brief set of covenants, conditions and restrictions (CC&R's), which primarily provide for dues and assessments for the maintenance of the subdivision's private roads.

The subdivision is a beehive of diverse activity. The administrative record includes a 1993 letter from the Holmes Ranch Association, which maintains the private roads within the subdivision. According to that letter, 53 subdivision parcels were developed for residential use, while 15 were vacant.[1] Eleven homeowners operated cottage industries, which included dental labs, ceramic studios, a manufacturer of furniture or cabinets, and a "publishing press." Three homeowners bred and trained horses, at times offering public instruction. Two homeowners used their home workshops to teach classes for the Mendocino Community College and the Mendocino Office of Education Regional Occupation Program (ROP). In addition, according to a June 10, 1993 letter to the county from the president of the Holmes Ranch Association, the subdivision then included three wineries (including Pepperwood Springs): two with tasting rooms; five vineyards; and two apple orchards.

The Holmes Ranch subdivision is classified by the Mendocino County general plan as "Remote Residential: 20 acres." The parcels are zoned "UR," or "Upland Residential," with a minimum lot size of 20 acres.

[1] Fifty-three and fifteen, of course, total sixty-eight. For reasons not clear to us, elsewhere in the record the subdivision is described as consisting of 64 and of 75 parcels. The discrepancy is not material to the issues raised on appeal.

The history of the Pepperwood Springs Winery (Winery) begins in 1975, three years after the creation of the Holmes Ranch subdivision, when a 10-acre vineyard was planted on the parcel that is the Winery's present site. As the trial court noted, the county's general plan and zoning ordinance permit the growing of grapes within the Holmes Ranch subdivision – but a winery requires a use permit.

Larry and Nicki Ann Parsons purchased the vineyard parcel in 1980. In 1981, the Parsonses applied to the Mendocino County Planning Department (Department) for a use permit to build and operate a winery. Their application contemplated the construction of a single wine cellar, with projected production of 1,000 gallons of wine in 1981 and 5,000 gallons per year by 1990. The Parsonses "want[ed] to make wine from the crops of grapes from the vineyard already existing on the property," but never indicated in their application that they would not import grapes from off-site if the need arose.

The Department's staff report on the Parsonses' application noted that the proposed winery operation would be "primarily wholesale with very little retail," since the winery would be two miles off the nearest highway, Highway 128. The staff report also noted the Parsonses' "plans do not include a tasting room." As the trial court found, the Department staff "made no recommendation with regard to [a] tasting room" and "made no comment concerning the source of the grapes to be used in the winery."

The use permit was issued but on one condition pertinent here: a one-page "Zoning Administrator Action Sheet" indicates, "Use is restricted by eliminating any retail sales of products and/or tasting facilities on site." Nevertheless, the Parsonses operated Pepperwood Springs Winery with a tasting room and made retail sales.

Larry Parsons died in an automobile accident in April 1986. Real parties in interest Gary and Phyllis Kaliher bought the winery in December of that year. Real parties began producing wine in 1987, and made less than 200 cases from grapes crushed in that year's September harvest.

In March 1989, real parties applied for a renewal of the Winery's Mendocino County Business License. Their application, plus a cover letter, indicated they conducted

retail sales by appointment only, although their sales were primarily wholesale. Their application was granted.

For the next 10 years, real parties operated Pepperwood Springs Winery with a tasting room and on-site retail sales. As noted, wine tasting and retail sales were not permitted under the original use permit issued to the Parsonses for Pepperwood Springs Winery.

In September 1999, real parties filed an application to modify the original use permit to allow a tasting room and retail sales.[2] Real parties asked that the use permit be modified "to allow: [¶] [c]ontinued wine tasting and retail sales by appointment only" and an increase in permissible wine production from 5,000 to 7,500 gallons per year. Their application admits they "have been operating a winery with tasting and retail sales by appointment only for the last ten . . . years."

The application described the winery site, i.e., the vineyard parcel originally purchased by the Parsonses, as including the 10-acre vineyard; a 1,600 square-foot house; a 1,450 square-foot agricultural building; a 1,774 square-foot winery; and a 200 square-foot storage shed. In a related letter to the Commission, real parties described Pepperwood Springs as "a very tiny operation," producing at most 3,000 cases of wine per year as compared to nearby wineries such as Navarro Vineyards (30,000 cases per year) and Handly Cellars (15,000 cases per year).

The Commission's staff report on the proposed modification, dated December 2, 1999, conducted an environmental review of several issues. The staff observed that increased wine production would increase water demand, a "contentious" issue in Anderson Valley. But the staff concluded that "[m]uch of [the Winery parcel] is used for the production of grapes, which is a permitted use by zoning, and it is the vineyards that would likely utilize the majority of water, as opposed to the actual wine production and

[2] Real parties believed that tasting and retail sales were permitted when they bought the Winery. Apparently, real parties filed their application after they were informed that their sales and tasting room were not authorized under the original permit.

tasting. Staff does not find that the expansion of the winery production from 5,000 to 7,500 gallons per year and the wine tasting would significantly increase water usage."

The staff also noted the concern of other Holmes Ranch homeowners that tasting and retail sales would cause "increased traffic on [the] privately maintained roads." But the staff received a memo from the State Department of Transportation stating that the roads were "in relatively good condition."

The Commission had in its files an August 1981 letter from the Holmes Ranch Association, sent with regard to the Parsonses' use permit application, which stated that, "All roads in the subdivision are owned, operated, and maintained by the Association. Public access to said roads is not permitted, nor has the Board of Directors ever granted such permission." While noting that "the County does not enforce CC&Rs of subdivisions or otherwise regulate private roads," the staff indicated it was "concerned about the potential for increased traffic" on the private roads "serving the predominantly residential subdivision."

Accordingly, the staff recommended restrictions on vehicular traffic similar to those imposed on cottage industries in residential areas. Sales and tasting would be limited to "by appointment only" between 10:00 a.m. and 5:00 p.m., and would be further limited to a maximum of 10 customers per day. The Winery would be required to maintain a guest register clearly identifying the number of daily visitors.

The Commission staff recommended the application for modification be granted, subject to these limitations. The staff recommended that the Commission find "that no significant environmental impacts would result from the proposed [modification] which can not [*sic*] be adequately mitigated through the conditions of approval," and accordingly the Commission should adopt a negative declaration. The staff also recommended that the proposed modification was consistent with the "applicable goals and policies of the [g]eneral [p]lan," especially the encouragement of agricultural enterprises.

The Commission held a public hearing on December 2, 1999. A number of local property owners testified against the modification. At the conclusion of the public hearing, the Commission continued the matter to its meeting of January 7, 2000. At that meeting, the Commission approved the modification application and adopted a negative declaration, finding that the modification would not pose any significant environmental impacts that could not be mitigated by the conditions of approval. The Commission further found that the modification was consistent with the general plan.

As part of the conditions of approval, the Commission ruled that real parties could *not* conduct on-site tasting or retail sales. But the glass was at least half-full: while denying the request for tasting and sales, the Commission did grant real parties' request for increased wine production. The Commission ruled that real parties could produce 10,000 gallons of wine per year – 2,500 more than the 7,500 they had asked for.

Believing that a tasting room and sales were necessary for the Winery to prosper, real parties appealed the Commission's ruling to the Board. In an agenda summary submitted to the Board for its March 14, 2000 hearing on real parties' appeal, the Commission advised the Board that its staff originally supported the modification of the use permit, "with limitations that would keep the size and scale of the business at a level of a 'cottage industry.' The basis for that recommendation was that, in staff's opinion, a cottage industry level of activity would generally be compatible with surrounding residential development."

The Commission further advised the Board as follows: "However, after hearing [the] concerns of the majority of the property owners in the area and considering the Planning Commission's concerns with these and other recent cases which sought to place visitor related services in rural residential and resource lands, staff no longer supports the wine tasting aspect of [the proposed modification]. Staff concurs with the Commission's general position that rural and remote residential and resource areas should be protected from the intrusion of tourists and visitor related commercial uses where such uses generate noise, traffic, wear and tear on private roads, etc., adversely impacting the

privacy, peace and comfort of the people who make their homes in the area. Such uses would be more appropriately located in more urbanized areas or along major transportation corridors where the related impacts are more acceptable and less likely to be significant. Therefore, staff recommends that the appeal be denied."

After a public hearing at which numerous people spoke for and against the proposed modification, the Board overturned the Commission's ruling. The Board granted real parties' request for modification of the use permit and reinstated the provisions allowing wine tasting and retail sales. The modification was subject to the following conditions pertinent to this appeal:

(1) On-site wine tasting and retail sales would be by appointment only, with a limit of 70 customers per week. The Winery would be required to maintain a guest register or appointment log clearly identifying the number of guests per day. The register or log would be subject to review upon request by the Department.

(2) Wine tasting and retail sales could only occur between 10:00 a.m. and 5:00 p.m.

(3) Maximum wine production would be limited to 10,000 gallons per year.

The Board also adopted a negative declaration, agreeing with the Commission's finding that the modification posed no significant environmental impact that would not be mitigated by the conditions on the modification.

Appellant filed a petition for writ of mandate in the superior court, alleging the County's decision to modify the use permit violated CEQA and was inconsistent with the County's general plan and zoning ordinance.[3] In a lengthy order that included a detailed

[3] A few matters of procedural housekeeping need to be discussed.

(1) From this point forward we refer to the Commission and the Board as "County" when discussing the decision to approve the modification of the use permit.

(2) The mandate petition identifies appellant as a group of County residents and property owners, some of whose members participated in the administrative proceedings and objected to the proposed modification. The group includes Holmes Ranch subdivision homeowners.

review of the facts, the superior court rejected appellant's arguments and found that the modification did not violate CEQA and was consistent with the general plan and applicable zoning laws. The court did find the 10,000-gallon wine production limit was invalid because the Board's notice of public hearing gave notice that the modification would permit only 7,500 gallons of wine per year. After the Board corrected its ruling to reduce the maximum wine production to the noticed amount of 7,500 gallons per year, the trial court denied appellant's mandate petition.

II. DISCUSSION

Appellant contends that the County's environmental review of the proposed modification was inadequate, because the County used the wrong baseline, failed to adequately consider numerous alleged environmental impacts, imposed insufficient mitigation measures, and allowed a modification in purported violation of the general plan and applicable zoning provisions.

The central issue of our review is the County's issuance of a negative declaration under CEQA for real parties' project, i.e., the modification of the use permit to allow tasting, retail sales, and increased wine production. Our review is carefully limited by settled law.

When it enacted CEQA, "the Legislature sought to protect the environment by the establishment of administrative procedures drafted to 'Ensure that the long-term protection of the environment shall be the guiding criterion in public decisions.' " (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74, quoting Pub. Resources Code, § 21001, subd. (d).)[4] In essence, CEQA requires local agencies to prepare an Environmental Impact Report (EIR) for any project which will have a significant effect

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(3) Apparently, the Kalihers sold the Winery in December 2000 to Eric Sterling. Mr. Sterling has not been added as a party to this appeal, but that is not material to the outcome of this case.

[4] Subsequent statutory citations are to the Public Resources Code. The administrative guidelines promulgated under CEQA, California Code of Regulations, title 14, § 15000 et seq. are cited in this opinion as "Guidelines."

on the environment. (§ 21151; *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 753.)

If a project is not exempt from CEQA and there is a reasonable possibility the project may have a significant environmental impact, the public agency must conduct an initial threshold study. If that study shows there will be no significant environmental impact, the agency may issue a negative declaration for the project. (*Citizen Action to Serve All Students v. Thornley*, *supra*, 222 Cal.App.3d at p. 753; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1000; Guidelines, § 15070.)

"The decision to adopt a negative declaration and dispense with an EIR is essentially a determination that a project will have no meaningful environmental effect" and terminates the environmental review process. (*Citizen Action to Serve All Students v. Thornley*, *supra*, 222 Cal.App.3d at p. 754; *Citizens of Lake Murray Area Assn. v. City Council* (1982) 129 Cal.App.3d 436, 440.) Thus, CEQA imposes "a low threshold requirement for preparation of an EIR." (*No Oil, Inc. v. City of Los Angeles, supra*, 13 Cal.3d at p. 84; see *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309-310.) An EIR must be prepared if "it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." (*No Oil, Inc. v. City of Los Angeles, supra*,13 Cal.3d at p. 75.)

"The standard of judicial review of an agency decision to adopt a negative declaration is whether there is substantial evidence in support of a 'fair argument' of potential environmental impact." (*Citizen Action to Serve All Students v. Thornley*, *supra*, 222 Cal.App.3d at p. 754.) Substantial evidence " 'means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion . . . .' " (*Id.* at p. 755, quoting Guidelines, § 15384, subd. (a).) Substantial evidence does not include argument, speculation, or unsubstantiated opinions or concerns about a project's environmental impact. (Guidelines, § 15384, subd. (a); *Citizen Action to Serve All Students v. Thornley*, *supra*, 222 Cal.App.3d at p. 756; *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1352.)

Appellant first contends that the County used the incorrect baseline when it evaluated the proposed modification. The term "baseline," in this context, essentially means the exact physical and environmental conditions that exist prior to a proposed project. Proper environmental review requires comparison of the significant environmental impacts and mitigation measures against the correct baseline conditions. (Guidelines, § 15125; see discussion in Remy et al., Guide to the Cal. Environmental Quality Act (10th ed. 1999) pp. 162-171.)

The parties agree, as did the trial court, that the proper baseline in this case is the existing *authorized* winery operation: i.e., no wine tasting, no on-site retail sales, and yearly production of 5,000 gallons. It would be improper to review the impacts of the proposed project against a baseline of environmentally unauthorized activity, thus allowing the Winery to argue the modification poses no environmental impact because it essentially memorializes the status quo. This would allow the Winery to benefit from its 10 years of tasting and sales activity in violation of the use permit.

But that is not what happened here. Because real parties' application for modification refers to "continued" wine tasting and retail sales, appellant claims the County used the existing, unauthorized activity as a baseline, rather than a no tasting/no sales baseline. Examination of the record reveals that the County used the proper baseline of no tasting/no sales. The Commission staff report on the proposed modification clearly indicates the County's awareness that no tasting or sales were authorized by the use permit. As the trial court found, the staff report reviewed the impacts of the proposed modification based on the proper no tasting/no sales baseline.

Next, appellant contends the County failed to analyze all significant environmental impacts of the project. The record does not support appellant's contention.

Traffic & Road Impacts

A tasting room and on-site retail sales will obviously increase vehicular traffic to and from the Winery, which is two miles from the nearest highway. Appellant claims that the County failed to consider the impact of increased traffic on the physical condition

of the subdivision's private roads. Apparently, the County did not perform a study of the road conditions. But the trial court correctly found that appellant "cites no evidence in the [administrative] record that would lead to the conclusion that a potential increase of 70 cars per week or several truck loads of grapes during harvest would be detrimental to the road[s]."

Appellant does cite the opinion of a Holmes Ranch resident that the roads "are not in satisfactory condition for the current residential and agricultural use by owners." But as we noted above, the State Department of Transportation reported to the County that the roads were "in relatively good condition." And "[c]onflicting assertions do not ipso facto give rise to substantial 'fair argument' evidence. [Citation.]" (*Citizen Action to Serve All Students v. Thornley*, *supra*, 222 Cal.App.3d at p. 755.)

The record shows the roads are widely used by a variety of traffic. The 1993 letter from the Association, after describing the bustling activity on the subdivision, states the roads are used "by owners, tenants, guests, business and tradespeople, agricultural workers, loggers, employees, clients, customers, students of the community college or the ROP program and emergency responders." The Winery's tasting room and retail sales would add to this substantial traffic only 70 customers per week, an average of 10 per day – and it stands to reason that the 70 people would not all come in separate cars.

The trial court aptly concluded that the 1993 letter "makes it clear that at least at the time of writing the Holmes Ranch Association was of the opinion that the ranch roads were in a condition to adequately provide for a number of quasi-commercial uses. The court finds no evidence in the record that rebuts this claim by the [A]ssociation." We agree with the trial court's conclusion. There is simply no substantial evidence to support a fair argument that the project would result in a significant impact on the physical condition of the roads.[5]

[5] Appellant claims the County "ignored" a report published by the Mendocino County Resource Conservation District and the California Department of Fish & Game, which, according to appellant, concluded that sediment from the roads adversely impacted the coho salmon spawning ground in nearby Mill Creek. Appellant cites only

Public Access

Appellant claims the project approval was flawed because it "requires travel by the public across a private road." As we have noted, the record contains a letter written to the Commission by the association's board of directors in 1981, in connection with the Parsonses' use permit application. That letter states that, "All roads in the subdivision are owned, operated, and maintained by the Association" and that, "Public access to said roads is not permitted nor does the Board of Directors grant such permission at this time."

But the question of public access is not pertinent to a CEQA analysis of the project. As the trial court properly concluded, if the association wants to enforce the private-road provisions of the subdivision CC&R's against real parties, they are free to take appropriate action. The public access issue is not before us, and we express no opinion thereon.

Importation of Grapes

Appellant claims the County failed to consider the impact caused by the importation of grapes from off-site, presumably by heavy trucks. This issue is a red herring. Appellant *assumes* that because annual wine production will increase from 5,000 to 7,500 gallons, the increase *must* require the importation of grapes – i.e., that 5,000 gallons per year is the maximum wine yield of real parties' vineyard. There is no evidence to support this assumption. "Speculation is not evidence." (*Citizen Action to Serve All Students v. Thornley*, *supra*, 222 Cal.App.3d at p. 756, fn. omitted.)

Furthermore, the County Code defines a winery as a place where grapes "grown on or off premises" are processed into wine. (Mendocino County Code, § 20.032.040, subd. (B).) Thus, a Mendocino winery operator has the right to make wine from grapes grown in other vineyards. Although the Parsonses said in their 1981 use permit application that they intended to use only grapes grown in their own vineyard, they did not give up their right to import. As the trial court correctly observed, importation of

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to a comment letter to the Commission, in which a project opponent referred to the report. There is no indication that the report does in fact exist and was submitted to the

grapes "was a permitted activity, and the right to conduct that activity is not lost simply by not asserting it."

Water Supply

Appellant claims the County failed to consider the impact on the water supply of producing an additional 2,500 gallons of wine per year. Appellant claims the County concluded that the increase in annual wine production would not significantly increase water usage without knowing the amount of water needed to produce a given amount of wine. Appellant's argument is not supported by the record.

While the Commission was reviewing the modification application, County Planner Frank Lynch received a memo from Glenn McGourty, a viticulture and plant science advisor for the University of California Cooperative Extension. The McGourty memo states that it takes 178 gallons of water to make one gallon of wine. Lee Edmundson, who appeared at the Commission's public hearing and spoke against the project, also received a copy of the memo. The memo was discussed at the hearing, and an unidentified speaker – apparently Planner Lynch – indicated he had spoken to McGourty and that the 178-gallon figure referred to the amount of water needed to *grow grapes* sufficient for one gallon of wine, not to *process* the grapes into a gallon of wine. The speaker referred to a post-it note on the memo, which reads: "1 gal. of wine = 3 gallons of water for processing[,] per Fetzer."

It thus appears the County had information, which does not appear to be controverted by appellant, that it took only three gallons of water to *process* grapes into one gallon of wine. Based on this information, the Commission's staff report concluded that the increased wine production would not significantly affect the water supply. It is the *growing* of grapes, not their processing, which uses a great deal of water. The growing of grapes is a permitted use of the property and is not the subject of the modification; neither is it at issue here.

County.

The trial court found that "[t]he only issue concerning water presented by this application was the difference in the amount of water that would be required to produce the permitted 5000 gallons and the amount that would be required to produce the applied for additional gallons. . . . The [County] reasonably deduced from [the] evidence that the amount of water used to produce wine is insignificant when compared to the amount of water used to produce grapes. [Appellant] points to no evidence in the record that would support a fair argument to the contrary."

We agree with the trial court. Appellant has not shown substantial evidence of a fair argument that the increased wine production would significantly impact the available water supply.

Mitigation Measures

Appellant also contends that the mitigation measures are inadequate. Appellant claims the visitor log provision is inadequate to police the number of visitors to the winery per week. But appellant has failed to show substantial evidence of inadequacy. (See *Citizens' Com. to Save Our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157, 1167.) Appellant refers to comments about the difficulty of enforcing the visitor restrictions – but as the trial court pointed out, these comments are expressions of opinion, not evidence. The County retains the power to spot-check the visitor log, and the association is perfectly free to observe the public comings and goings of winery visitors. Should real parties violate the 70-visitor/week restriction, the association may take the appropriate steps. But appellant has failed to show by substantial evidence that the mitigation measures are inadequate.[6]

Finally, appellant contends the modification is inconsistent with the County's general plan and zoning laws. In essence, appellant claims the Winery's tasting room and

[6] Appellant briefly argues the County has failed to provide for a mitigation and monitoring program, as required by section 21081.6, subdivision (a)(1). But the County did not so fail; rather, it imposed the monitoring program centered around the visitors log and the County's right to inspect it.

retail sales amount to an impermissible commercial use of property that, under the plan and zoning laws, is limited to low-level agricultural uses.

The County's decision essentially interprets its own plan and zoning laws. As such, that decision comes to us "with a strong presumption of regularity." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717; see *Families Unafraid to Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1338.)

We see no inconsistency between the modification and the plan and zoning laws. The general plan classifies Holmes Ranch subdivision as "Remote Residential." As the trial court noted, the general plan provides that "Remote Residential" property can be used for cottage industries and agricultural uses. The zoning laws classify a winery as an agricultural use and specifically include winery tasting rooms. (Mendocino County Code, §§ 20.032.040, subd. (B), 20.056.020, subd. (D).) Thus, the modification is entirely consistent with the plan and the zoning laws, and appellant's claim to the contrary is without merit.[7]

III. DISPOSITION

The judgment denying the petition for writ of mandate is affirmed.

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Marchiano, P.J.

We concur:

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Swager, J.

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Margulies, J.

[7] Appellant also claims that even if the project is an agricultural use, it still is not permitted by the plan and zoning laws because of inadequate access and hazard exposure. We have discussed and rejected the access issue, and appellant's hazard exposure argument is based on an unestablished premise that the roads are in bad condition.